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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KARIN DEBBY MERTZ,

Defendant and Appellant.

G032566

(Super. Ct. No. 03NF0461)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Judge. Affirmed in part, reversed in part, and remanded with directions.

Dabney B. Finch, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Holley A. Hoffman and Maxine P. Cutler, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Karin Mertz of possessing methamphetamine for sale and possessing drug paraphernalia. She complains the court abused its discretion by failing to refer her for an evaluation to enter the California Rehabilitation Center (CRC), pursuant to Welfare and Institutions Code section 3051. (All unspecified statutory references are to this code.) We agree the trial court erred in failing to make the CRC referral, and therefore vacate the sentence.

I

On the afternoon of February 5, 2003, Mertz telephoned the Anaheim Police Department for assistance during an argument with her boyfriend. When the officers arrived, Mertz's boyfriend revealed she was on parole for possession of methamphetamine. Officers found seven grams of crystal methamphetamine in her purse, smaller quantities of the drug elsewhere in her car, along with a scale, tin foil, and two drug pipes. Testifying as an expert witness, a narcotics officer concluded the drugs were possessed for sale, but acknowledged Mertz also could be a drug user.

According to the presentence report, Mertz's first criminal conviction was for possession of methamphetamine in February 1998, at the age of 34. Her probation was revoked after she twice tested positive for methamphetamine. In October 1998, police officers discovered methamphetamine in her bedroom. She received probation, including nine months in jail, after pleading guilty to possession. In October 2000, Mertz was again convicted of possession of methamphetamine and sentenced to 16 months in state prison. She was on parole when arrested and convicted in the current case.

Mertz informed the probation officer her mother was an alcoholic, succumbing to the disease in 1985. Mertz experimented with alcohol, marijuana, and cocaine during adolescence, but quit drinking because she feared becoming an alcoholic. She regularly used methamphetamine and realized she was addicted shortly before her first arrest. She checked into a sober living home during 1997, but never participated in a drug rehabilitation program.

Mertz's parole agent described her as "a nice person with a drug problem." She tested positive for drugs more than once while on parole. He believed caring for her terminally ill father may have affected her ability to remain drug free. However, she maintained "negative peer associations," including a boyfriend who was also a user. The parole officer concluded she was addicted to drugs and an appropriate candidate for the CRC.

The probation officer noted Mertz's current offense, her third felony conviction committed while on parole, represented "a continuation and an escalation of her criminal activities." Nevertheless, he concluded she was a "personable, articulate and intelligent individual. She has been a permanent county resident since childhood, and she also reports a history of employment and viable job skills. She seemed candid during her presentation of her substance abuse history, and she readily acknowledged her addiction to methamphetamine." While he did not minimize the seriousness of her record and present offenses and felt a prison sentence was "extremely appropriate," he also noted "her record does not reflect any acts of violence and all of her offenses seem drug related. Therefore, it is recommended that she be evaluated for the California Rehabilitation Center per 3051 WI."

At the sentencing hearing, defense counsel requested a referral to CRC based on Mertz's addiction to methamphetamine. He also noted that while in jail awaiting trial, she completed a community college course on substance abuse, participated in a GED program, and completed or participated in various other programs. The court interjected: "It looks like the only times she does things positive for herself is when she's actually incarcerated; right?" Counsel replied Mertz would benefit from the structured setting of CRC, and argued for a mitigated term if the court denied her request for an evaluation.

The prosecutor recommended a midterm sentence, but did not respond to Mertz's request for a referral to CRC. The trial court found Mertz had previously served

a term in prison (Pen. Code, § 667.5, subd. (b)) and selected the upper prison term for the drug count because Mertz was on parole (Cal. Rules of Court, rule 4.421(b)(4)) and her prior performance on parole was unsatisfactory (rule 4.421(b)(5)). As for the referral to CRC, the court commented: “Court recommends a drug program while in custody in state prison. The request for an evaluation for CRC denied.”

II

Mertz contends the trial court erred by failing to state valid reasons for rejecting her CRC application. We agree.

Section 3051 states, in relevant part: “Upon conviction of a defendant for a felony . . . and upon imposition of sentence, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics the judge *shall* suspend the execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment, and rehabilitation facility unless, in the opinion of the judge, the defendant’s record and probation report indicate such a pattern of criminality that he or she does not constitute a fit subject for commitment under this section.” (Italics added.) Thus, sentencing courts are required to order a CRC referral for a defendant found to be a narcotics addict or in danger of becoming one unless the trial court finds the defendant has engaged in “‘excessive criminality.’” (*People v. McGinnis* (2001) 87 Cal.App.4th 592, 595-596 (*McGinnis*) [“‘excessive criminality’ is the functional equivalent of a statutory finding of ‘pattern of criminality’”].)

The sentencing court must state the reasons for refusing to initiate CRC commitment proceedings, and “may not merely parrot the phrase finding ‘excessive criminality.’” (*People v. Masters* (2002) 96 Cal.App.4th 700, 706 (*Masters*); see also Cal. Rules of Court, rule 4.406 (b)(9) [not committing an eligible defendant to CRC is a sentencing choice requiring a statement of reasons].) There is a split of authority on how

the sentencing court satisfies this requirement. *McGinnis* concluded the trial court must identify what aspect of a defendant's criminal history renders him or her unsuitable for a CRC commitment. (*McGinnis, supra*, 87 Cal.App.4th at p. 597.) In contrast, *Masters* rejected the more stringent *McGinnis* standard, and required only that the court specify ““where the court was looking in making its finding of [a pattern of criminality]. In other words, was it looking at the defendant's prior convictions, his prior performance on probation or parole, the nature and seriousness of the current offense, or some other facts evidencing criminality?”” (*Masters, supra*, 96 Cal.App.4th at p. 706.) We need not decide whether the more exacting standard of *McGinnis* should apply because here the trial court failed to state *any* reasons for denying the CRC referral.

Turning to whether the error was prejudicial, the Attorney General argues “this record was not sufficient to put the trial court on notice, as a matter of law, that [Mertz] may be addicted or may be in imminent danger of becoming addicted to narcotics.” We disagree.

Mertz had been using methamphetamine since the age of 17. From the age of 20, she used it three times a day until committed to state prison. After her release, she continued to use methamphetamine once or twice a week, and was on a four-day binge before her arrest in this case. Both her probation and parole officers concluded she was addicted to methamphetamine and a candidate for CRC. The prosecution's narcotics expert opined methamphetamine was “highly addictive.” In sum, the evidence on the point was undisputed and the court could not reasonably have found Mertz was not at least in danger of addiction. (*People v. Perez* (1987) 196 Cal.App.3d 686, 694-695 [record amply established the defendant may be addicted or, at a minimum, is in imminent danger of becoming addicted to narcotics].)

The Attorney General also argues the trial court's rejection of a CRC referral was implicitly based on defendant's excessive criminality. But it is not at all clear the court had this issue in mind when it denied defendant's request. The court's

only response to defendant's CRC application was to note "the only times she does things positive for herself is when she's actually incarcerated." As is apparent, this comment focuses on defendant's lack of motivation to curb her drug habit, and does not address whether she engaged in a pattern of criminal activity that rendered her unfit for CRC. Moreover, it is not for the trial court to decide whether a defendant's prospects for drug rehabilitation are promising. "[W]hether or not any given defendant can be treated with success is a fact which, in the last analysis, must be determined not by judges but by people trained in that field and actually engaged in the treatment process. Hence, out of practical necessity, the statute leaves to the professional experts the final decision on whether or not treatment should be begun or be continued" (*People v. Ryan* (1992) 9 Cal.App.4th 1855, 1858; *People v. Leonard* (1972) 25 Cal.App. 1131, 1136 [lack of motivation not a valid reason to reject CRC referral of an otherwise eligible defendant].)

Finally, we consider whether the record would have supported excluding Mertz from CRC based on a pattern of criminality. We conclude it would not. Determining whether defendant has engaged in a pattern of criminality "necessarily involves an assessment, based upon the defendant's record and probation report, whether the defendant's main problem is drug abuse or a criminal orientation as reflected in a pattern of criminality. Because this is inherently a qualitative judgment on the available information, the statute invests the court with a broad discretion" (*People v. Cruz* (1990) 217 Cal.App.3d 413, 421 (*Cruz*).) The trial court's task is to "screen out those addict-defendants who because of their pattern of criminality most obviously are unlikely to benefit from the rehabilitative program, and might disrupt or impede the treatment of others." (*Id.* at p. 419.)

In *Cruz*, the court concluded it was not an abuse of discretion to reject a request for a CRC referral where defendant had been convicted of four counts of selling drugs, including one \$22,000 transaction involving a kilogram of cocaine. (*Cruz, supra*, 217 Cal.App.3d at p. 417.) Defendant's admission he was "addicted to money and this

was the easy way to make money”” (*ibid.*) demonstrated his “criminal orientation” was unrelated to drug abuse. (*Id.* at p. 421; see also *Masters, supra*, 96 Cal.App.4th 700, 704-706 [trial court’s rejection of CRC upheld where defendant possessed “substantial amount of drugs,” weapons and ammunition and was an “active seller” trafficking in methamphetamine].)

In contrast, *McGinnis* concluded the trial court abused its discretion by rejecting a CRC referral even though defendant was on probation for receiving stolen property when he committed four residential burglaries and had a prior conviction for misdemeanor burglary. Based on defendant’s background and the nature of his drug addiction, the court concluded defendant’s criminal endeavors “were undertaken to secure funds to feed a drug habit,” which was “severe, protracted, and clearly the motivating factor for his criminal activity.” (*McGinnis, supra*, 87 Cal.App.4th at p. 597.) Emphasizing defendant’s offenses were nonviolent and he had sought assistance for his addiction, but the costs of various programs were beyond the financial means of his family, the court held defendant’s criminal record did not render him unfit for a CRC evaluation. (*Id.* at p. 598.)

Here, the facts are less egregious than those found in *McGinnis*. Mertz’s crimes were nonviolent, and her past offenses involved simple possession for personal drug use. The amount of drugs she possessed was not large, and any intent to sell small amounts was an outgrowth of her addiction, as the prosecution expert on narcotics explained: “With the street level dealer, that [people who both sell and use] is typically the norm. These people do not have a job like you or I do. And they are addicted. The stuff is highly addictive. And in order to support that habit, buy extra, give them a better price and then in turn divide it up and sell it and from the proceeds of that, support their habit.” Mertz had sought help in a sober-living home at the end of 1997, and had completed a community college course on substance abuse while in custody awaiting trial.

Whether a defendant's pattern of criminality disqualifies her from a CRC evaluation turns on whether her criminal endeavors are causally related to drug addiction or stem from a distinct disposition or "orientation" toward the criminal lifestyle, such as the defendant's profit motive in *Cruz*. Here, there is no evidence to support the inference Mertz's crimes were motivated by anything other than her drug dependence, which, by all accounts, was "severe, protracted, and clearly the motivating factor for [her] criminal activity." (*McGinnis, supra*, 87 Cal.App.4th at p. 597.) Both Mertz's parole and probation officers recommended a CRC evaluation based on these undisputed facts. Because there was no contrary evidence rendering Mertz unfit for a CRC evaluation, we conclude the trial court erred in refusing the request for a CRC referral under section 3051.

III

The imposition of sentence is vacated and the matter is remanded for resentencing. The trial court is directed to suspend execution of sentence and institute civil narcotics addict commitment proceedings under Welfare and Institutions Code section 3051.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.